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No. 55

IN THE

Supreme Court of the United States

October Term, 1957

AMERICAN AIRLINES, INC., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, INC., *Respondent*,

and the

CIVIL AERONAUTICS BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Petitioner prays that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit insofar as said judgment reversed in part an order of the Civil Aeronautics Board.

OPINION BELOW

The opinion of the Court of Appeals is printed at pp. 56-57 of the Record and is reported at 235 F.2d 863 (D.C. Cir. 1956).

This opinion was rendered after this Court, in April, 1956, had reversed and remanded a previous

decision in this proceeding by the same Court of Appeals. *American Airlines* v. *North American Airlines*, 351 U.S. 79 (1956). The earlier history of the proceeding is summarized in the opinion of this Court. 351 U.S. at 80-81. The prior opinion of the Court of Appeals is reported as *North American Airlines* v. *Civil Aeronautics Board*, 228 F.2d 432 (D.C. Cir. 1955).

The opinion, findings and order of the Civil Aeronautics Board at issue here are printed at pp. 23-52 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (R. 57-58). Timely petitions for rehearing by petitioner and by the Civil Aeronautics Board were denied by the Court of Appeals on September 18, 1956 (R. 58). The petition for writ of certiorari was filed on December 17, 1956, and was granted on January 28, 1957 (R. 59). The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can the Court of Appeals review the scope of a remedial order of the Civil Aeronautics Board where admittedly respondent had not objected thereto before the Board—or even before the Court of Appeals—and where the applicable statute confines the reviewing court to consideration of objections urged before the Board?

2. To protect the public from statutory unfair practices in common carriage by air, the Board properly prohibited use by an air carrier of a name which caused public confusion because of similarity to the

previously established name of a competing air carrier. In framing a remedial order is the Board's discretion so restricted that it cannot also reach variations of that name unless it is shown that the competitor's name has the secondary meaning necessary to establish a private property interest therein?

STATUTES INVOLVED

1. Section 1006(e) of the Civil Aeronautics Act, 49 U.S.C. §646(e), provides in pertinent part:

> "No objection to an order of the [Civil Aeronautics] Board shall be considered by the [reviewing] court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."[1]

2. Section 411 of the Civil Aeronautics Act, 49 U.S.C. §491, provides:

> "The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or

[1] Similar statutory provisions include: Section 9(a) of the Securities Act of 1933, 15 U.S.C. § 77(i); Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(y); Section 24(a) of the Public Utility Holding Company Act, 15 U.S.C. § 79(x); Section 10(a) of the Fair Labor Standards Act, 29 U.S.C. § 210; Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e); Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717(r); Section 313(b) of the Federal Power Act, 16 U.S.C. § 825(1); Section 4(h) of the Federal Alcohol Administration Act, 27 U.S.C. § 204(h); and see Sen. Doc. No. 248, 79th Cong., 2d Sess. 289, n. 21 (1946), explaining Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e).

ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

As this Court held in its prior opinion, 351 U.S. at 82, Section 411 is based on Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

STATEMENT OF THE CASE

This Court will recall from its previous review that respondent and petitioner competed as common carriers over the principal air route in the country—New York-Chicago-Los Angeles. Petitioner's predecessor commenced operations in 1930 as American Airways. Petitioner itself began business in 1934 as American Airlines, under which name it has operated and advertised its service ever since.

Respondent commenced business in 1947 as Twentieth Century Airlines. In 1951—seventeen years after petitioner had started using the name American Airlines—respondent began using the name North American Airlines. In March, 1952, it advised the Civil Aeronautics Board of this name change. 351 U.S. at 80. Thereafter the Board instituted this proceeding under Section 411 of the Civil Aeronautics Act to determine whether respondent's use of the North American name caused substantial public confusion between respondent and petitioner because of the similarity of the two names. 351 U.S. at 81.

After a full evidentiary hearing, which this Court accurately described as "extensive," 351 U.S. at 81, the Examiner concluded that respondent had violated Section 411 and that an order should be entered requiring respondent to stop using the North American name "or any variation of the name 'American'" in air transportation (R. 22). The Board agreed with the Examiner. It held:

> "It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record *by eliminating what we find to be the cause of such confusion.*" (R. 31-32) (emphasis added).

It therefore entered an order on November 4, 1953—over four years ago—substantially as recommended by the Examiner, requiring respondent to stop engaging in air transportation under the name "North American, or any other name which includes the word American." (R. 51-52).

Under Section 1006 of the Civil Aeronautics Act respondent appealed the Board's decision to the lower court. That court set aside the Board's order on the ground that a case of name confusion was beyond the jurisdiction of the Board under Section 411 of the Act absent a showing of deliberate deception or fraud. 228 F.2d at 437, 442-444.

On certiorari this Court reversed. It held that the Board's "evidentiary findings concerned confusion of the type which can support a finding of violation of Section 411," and it remanded the case for further proceedings only because "we do not understand the court to have decided whether the Board's

findings were supported by substantial evidence on the record as a whole." 351 U.S. at 86.

Shortly after that decision this Court denied certiorari on a petition by this same respondent to review a decision of the Court of Appeals for the Ninth Circuit, affirming a decree against respondent in a private law unfair competition suit in a United States District Court in California. That suit had been brought by an aircraft manufacturing company, North American Aviation, Inc., charging that respondent had fraudulently adopted its North American name to appropriate the good will of the manufacturing company. The District Court found this charge to be correct and enjoined respondent here from using "the name 'North American,' or any name of which the name 'North American' forms a part . . . ." *North American Aviation, Inc.* v. *North American Aircoach Systems, Inc.* (S.D. Calif., Cent. Div., 1955), Case No. 13,412-PH [unreported], *aff'd, North American Aircoach Systems, Inc.* v. *North American Aviation, Inc.*, 231 F.2d 205 (9th Cir. 1955), *cert. denied*, 351 U.S. 920 (1956).

Respondent was compelled therefore to change its name. In May, 1956, a few days before the present case was returned by this Court to the lower court, respondent dropped the North American Airlines name and began using the name Trans American Airlines. This was done without advising the lower court or the Board, and it was, of course, a violation of the Board's Business Name Regulation, 14 C.F.R. §291.28 (1953), which requires that a carrier secure Board approval for a changed name. 351 U.S. at 80.

By motion petitioner advised the lower court of the change in the name used by respondent and asked the

lower court either to declare inoperative or to vacate its stay of the Board's order—a stay which had been granted at the time of respondent's initial appeal. The lower court did not act on petitioner's motion. Rather, and without briefs or argument from the parties, it rendered the judgment here in question. Its opinion sustained the Board's evidentiary findings of substantial public confusion, thereby discharging the task for which this Court had remanded the case. It thus affirmed—as indeed it had to under the decision of this Court—the order of the Board requiring respondent to cease and desist from using the North American name (R. 56). Respondent has not sought review by this Court of that part of the lower court's decision.

But the lower court went on to hold, in one sentence, that "the evidence does not support the finding of the Board that the term 'American' had acquired a secondary meaning . . ." Despite the fact that the Board had specifically held that this finding was not necessary to its decision and that secondary meaning need not be proved in a Section 411 case for the protection of the public (R. 30; *infra*, pp. 20-21), the lower court decreed: "Accordingly, we set aside the order of the Board insofar as it orders [respondent] to cease and desist engaging in air transportation under any other name which includes the word 'American.'" (R. 56-57).

The Court of Appeals thus dealt with the scope of the Board's remedial order. Yet, as respondent admitted at page 2 of its Brief in Opposition in this Court, respondent had never raised objection to the scope of the order before the Board or even before the lower court. It had had numerous opportunities to do so. *Infra*, pp. 11-13.

Moreover, in fettering the Board's discretion to shape a remedial order by requiring establishment of secondary meaning, the lower court once again confused doctrines applicable in private law trade name cases with the considerations properly governing a Section 411 proceeding in the public interest. Its prior opinion in this case had betrayed similar confusion. See, *e.g.*, 228 F.2d at 440-443.

Both petitioner and the Board filed with the lower court petitions for reconsideration which included the grounds which were set forth in the petition for certiorari and which are now presented. These were denied without opinion (R. 58).

Subsequent to the grant of certiorari in this case there took effect an earlier Board order in another proceeding against respondent and certain others who, together with respondent, had been engaging in air transportation as the so-called North American Combine. Among other things that order required respondent and other members of the Combine to cease and desist from engaging in air transportation because of numerous violations of the law by them. (These violations were unrelated to the name question.) That order became effective on June 6, 1957, after it had been affirmed by the court below, *North American Airlines* v. *Civil Aeronautics Board*, 240 F.2d 867 (D.C. Cir. 1956), and after this Court had denied certiorari, 353 U.S. 941 (1957). We shall not repeat the facts and arguments contained in the memoranda previously submitted to this Court in August and September, 1957, by the Board and by petitioner as to why the instant case is not moot and as to why the issues involved are as important now as when certiorari was granted. For a full discussion of these points we invite the Court's at-

tention to those memoranda. Suffice it to say here that respondent has not dissolved, it remains an applicant for common carrier authority from the Board, and it has not abandoned any claim to use of the Trans American name.

SUMMARY OF ARGUMENT

1. Section 1006(e) of the Civil Aeronautics Act confines a reviewing court to consideration of objections urged before the Civil Aeronautics Board unless there were reasonable grounds for failure so to have urged the objections. Here the lower court set aside the remedial order of the Board, insofar as it went beyond proscription of the particular practice found to have violated the Act. This it did *sua sponte;* admittedly respondent had never objected to the scope of the order either in the Board proceeding or even before the lower court. There was no extraordinary circumstance justifying respondent's failure to object. An order of the scope now in question had been proposed to the Board's Examiner and had been recommended by him. Neither in exceptions to his recommendation nor upon any of its other opportunities for attacking the scope of the order did respondent make objection to it. The lower court, therefore, in acting upon its own initiative, exceeded its power.

2. The lower court upheld the Board's order that respondent cease using the name North American Airlines on the ground that it caused confusion between respondent and petitioner, American Airlines, but it set aside the order insofar as it prohibited respondent from using other variations of the name American—such as Trans American Airlines—on the ground that no secondary meaning had been established in the name American. This is an improper inter-

ference with agency discretion to reach beyond a particular transgression and "to close all roads to the prohibited goal." In fashioning a remedy, when wrong has been established, an agency has wide latitude, in view of its experience and its peculiar competence. Notably should this be true in a highly specialized field, such as that for which the Civil Aeronautics Board has responsibility. Since the root of the wrong in this instance was, of course, confusion respecting the word American, the Board's choice of remedy was directly related to prevention of recurrence of confusion. Indeed the remedy was of the same scope as that long adopted by the Federal Trade Commission in comparable name cases arising under Section 5 of the Trade Commission Act.

Nor is the doctrine of secondary meaning—drawn from the private law of trademarks and trade names—relevant to the problem. As the Board itself pointed out, the private law doctrine of secondary meaning does not limit the Board's power to protect the travelling public from the evils of name confusion in common carrier air service. A similar view has been sustained by Courts of Appeals under Section 5 of the Trade Commission Act. As in its previous decision in this case, the lower court has fallen into the error of attempting to apply the law of private property in trade names to a problem of public regulation of common carriers by air.

ARGUMENT

I. The Lower Court Had No Authority To Review *Sua Sponte* the Scope of the Board's Remedial Order Because Admittedly Respondent Had Made No Objection Thereto Before the Board

Section 1006(e) of the Civil Aeronautics Act provides that the reviewing court *shall not consider* any objection to an order "unless such objection shall have been urged before the Board" or "unless there were reasonable grounds for failure to do so." [1] In its opposition to the grant of certiorari in this case respondent admitted that it had not questioned the scope of the Board's remedial order before either the Board or the lower court (Br. in Opp., p. 2). The lower court thus acted entirely *sua sponte* in passing on the scope of the Board's order.

Neither is there any suggestion by the lower court, nor could there be, that there were any "reasonable grounds" for respondent's failure to object to the Board. Respondent itself has not given any reason, good or bad, for this failure.

Certainly there were numerous opportunities for respondent to raise the scope question, as the following brief review will show. The full transcript of the case has been sent by the lower court to this Court but only that portion has been printed which is necessary to present the questions at issue. However, in

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[1] The only other Court of Appeals which has dealt with the question held that Section 1006(e) means what it says: a reviewing court cannot consider objections not presented to the Board. Western Airlines v. Civil Aeronautics Board, 196 F.2d 933 (9th Cir. 1952), cert. denied, 344 U.S. 875 (1952).

this review, we shall refer to documents in the unprinted transcript (cited as Tr. . . .) simply to indicate the numerous opportunities to raise objection of which respondent admittedly did not avail itself.

After the evidentiary hearing all parties—petitioner, the Board's enforcement staff, respondent—filed briefs with the hearing Examiner. Each briefed the questions of fact as to the nature and extent of name confusion and the questions of law as to whether a Section 41 case had been made out. Petitioner and the Board's staff each requested entry of an order prohibiting respondent from using either the name North American or any other name which included the word American (Tr. 720, 757). But respondent's brief did not deal with the question of the proper scope of the order if a Section 411 case were proved (Tr. 765-797).

The Examiner concluded that respondent should be barred from using the North American name "or any variation of the name 'American'" (R. 22). Respondent's detailed, forty-five pages of exceptions dealt entirely with the question whether a Section 411 case had been established. Respondent said nothing about the scope of the order which should be entered in the event the Board found a Section 411 violation (Tr. 846-890).

Petitioner and respondent then filed new briefs to the Board itself. Petitioner asked the Board to issue an order of the scope recommended by the Examiner (Tr. 960). And, by relying on its brief to the Examiner, the Board's enforcement staff made the same request (Tr. 897). But respondent's brief did not deal with the question as to what kind of

an order should be entered if it lost its argument that it had not violated Section 411 (Tr. 899-915).

Again, on oral argument to the Board, respondent's counsel did not even advert to the recommended scope of the order. His argument dealt only with the existence or nonexistence of a Section 411 violation (Tr. 997-1028).

As noted previously, in its decision the Board ordered respondent to stop using the name North American "or any other name which includes the word American." (R. 51-52). Respondent did not seek reconsideration or rehearing of this or any other phase of the Board's decision even though permitted to do so by the Board's rules. 14 C.F.R. §302.37 (1953).

In sum, from the start of the Board proceeding to its finish respondent declined to avail itself of numerous opportunities to question the scope of the Board's order. Hence, in reviewing the scope of the Board's order, the lower court exceeded its statutory authority.

A recent decision of this Court, *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955), is dispositive. That case involved Section 19(b) of the Natural Gas Act which, for purposes of the issue here, is identical to Section 1006(e) of the Civil Aeronautics Act. It provides:

> "No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission . . . unless there is reasonable ground for failure so to do."

The Federal Power Commission, in fixing a natural gas rate, had refused to include as part of the cost of

gas service a loss from certain gasoline operations. Before the Commission the gas company had objected that the method employed by the Commission in allocating the gasoline expense was erroneous and that a proper allocation would show that there had been no loss on gasoline operations. But the company had not contended that, if there were a loss on gasoline operations, the amount of that loss should nevertheless have been included as part of the cost of natural gas service.

Similarly here: respondent here had objected to any finding by the Board of a Section 411 violation, just as respondent there had objected to a method of cost allocation. But respondent here had not argued against the scope of the order which it was proposed that the Board should enter if it were determined that there *was* a Section 411 violation just as the respondent in *Colorado Interstate* had not argued against disallowance of the loss as a cost of gas service if it were determined that there *was* a loss on the gasoline operations.

In both instances, each agency had every reason to believe that the company involved was resting its case on one ground—in *Colorado Interstate*, that it had not sustained a loss in gasoline operations; here, that it had not violated Section 411. In neither case did the respondent evince any concern as to what, in the event its contention were rejected, should be done by the agency.

In *Colorado Interstate* the reviewing Court of Appeals agreed with the Commission's method of allocation, but then *sua sponte* held that the gasoline loss should have been included as a part of the cost of the natural gas service—even though that issue had not

been raised before the Commission or the reviewing court itself. The lower court here took similar action. Respondent had not asked the lower court to review the scope of the Board's order (Br. in Opp., p. 2)—just as it had never asked the Board itself to consider the question. Nevertheless, here, as in *Colorado Interstate*, the Court of Appeals decided the issue *sua sponte*.

On certiorari in *Colorado Interstate*, this Court reversed, setting forth at some length the reasons for not permitting a reviewing court to go beyond the objections urged to the agency by the appealing party. The Court stated in language equally applicable here:

> "Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of §19(b) that objections must first come before the Commission." 348 U.S. at 499. See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649 (1945).

This Court added that Section 10(e) of the Administrative Procedure Act strengthens, rather than weakens, "the principle requiring the exhaustion of administrative remedies before permitting court review." 348 U.S. at 499-500. This is the section which permits judicial review only of questions which have been "properly 'presented.'" 348 U.S. at 500.

Indeed, quite apart from specific statutory limitations, it is a matter of general law governing review of agency orders that the appellate court must consider only objections urged before the agency.

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless that administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (footnotes omitted). See also *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291 (1949); *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 154-155 (1946).

The importance of this rule is underscored by decisions holding exceptions or objections to be deficient because too general. Thus, it is not enough to object to a remedial order as "contrary to, and unsupported by, the evidence and contrary to law." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953). The objection must be sufficiently specific to "apprise the Board that petitioner intended to raise the question now presented." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255 (1943); see also *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386-387, n. 5 (1945); *National Labor Relations Board* v. *Stow Manufacturing Co.*, 217 F.2d 900, 906 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); *Western Airlines* v. *Civil Aeronautics Board*, 196 F.2d 933, 936-937 (9th Cir. 1952), *cert. denied*, 344 U.S. 875 (1952). The Board's own rules incorporate this principle; they require that an exception

be specific "and shall state the grounds for such exception." 14 C.F.R. §302.30 (1953).

While these requirements are academic here since respondent has admitted that it did not make the objection to the Board, still they are significant in demonstrating that, far from paying mere lip service to the rule on objections, the courts have insisted that to permit subsequent appellate review an objection must have been precise enough to permit its recognition and consideration by the agency.

This same rule, inherent in both statutory and general law, makes no exception for objections going to the scope of the remedy. This is the square holding in *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U.S. 385, 387-389 (1946); see also *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *National Labor Relations Board* v. *Stow Manufacturing Co.*, 217 F.2d 900, 906 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); *National Labor Relations Board* v. *Winter*, 154 F.2d 719, 722 (10th Cir. 1946). Indeed, application of the rule makes particular sense where scope of remedy questions are involved. For in this area—the shaping of remedies to meet law violations—the agencies have been accorded especially broad discretion. See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346, 348 (1953); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612-614 (1946); *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U.S. 385, 388 (1946).

The lower court's action cannot be excused on the ground that, even though respondent had not objected to the scope of the order, a dissenting Board member

had done so. The dissenter's point was that he would have permitted continued use of the North American name with qualifying language to show that respondent and petitioner were two different carriers, on the theory that this would both preserve respondent's good will in the name North American and protect the public from confusion (R. 39-40).

This is a question very different from that raised by the lower court. Of course, the remedy which the dissenter suggested would involve obvious practical difficulties in the air transportation field where spot radio and newspaper announcements are so important; therefore, it is not surprising that the majority of the Board did not adopt the dissenter's suggestion. But—and this is what is controlling here—the questions involved in the dissenter's suggestion have nothing to do with the questions involved in determining whether to permit *other* combinations of the word American, not theretofore used by respondent and in which, accordingly, no good will had been created. The forestalling of other forms of the same violation of Section 411 of the Act—well illustrated in this case by the change in the prefix from "North" to "Trans"—presents considerations quite different from those voiced by the dissenter. An objection to an agency order on one ground will not preserve objections to the order on other grounds. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499 (1955); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649 (1945).

The very fact that the dissenter focused attention on the remedy makes the lower court's action even less justifiable. The Board had every reason to believe that it was deciding all the questions which respondent wanted to raise—the dissent had proposed

a different remedy and respondent did not even then raise any question on the remedy point by a petition for reconsideration, though entitled to do so under the Board's rules. *Supra*, p. 13. From beginning to end respondent had made it as clear as though it had explicitly stated as much that it wanted to stand or fall on its unrestricted right to use the name North American, and that, if any order were to be entered, the scope of that order (which had been proposed in the very first briefs to the Examiner) did not concern it.[1]

This, then, is a case of aggravated violence to the salutary principle which underlies Section 1006(e)

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[1] It need hardly be pointed out that the lower court was not authorized to consider objection to the scope of the remedial order by virtue of the fact that respondent had argued that its use of the North American name did not violate Section 411. In the Board proceeding respondent had urged, among other things, that there was no confusion in fact, that there was no fraud or "palming off," and that respondent was free to use North American because no secondary meaning in American had been established (R. 29-30). With the rejection of respondent's argument that it could properly use the North American name, the force of respondent's objection was spent. Respondent never directed either the secondary meaning or any other phase of its argument to the question of the scope of the remedial order. Determination of the substantive offense is one thing; fashioning the remedy is quite another, involving very different considerations peculiarly administrative in nature and including factors of prevention and correction not applicable to the violation issue. Cf. Federal Trade Commission v. National Lead Co., 352 U.S. 419, 429-431 (1957). Hence an argument directed to the question of violation does not automatically apply to the question of remedy; it must be specifically addressed to the latter question. Respondent here wholly failed to do so. Accordingly, it did not "apprise the Board that [it] intended to raise the question now presented." Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, 255 (1943).

of the Act and similar provisions in other statutes. For here respondent did not even carelessly sleep on its rights—it deliberately did not assert the objection now raised *sua sponte* by the lower court at the eleventh hour in this long litigation.

II. The Lower Court Has Improperly Interfered With the Board's Administrative Discretion In the Choice of Remedy To Prevent Recurrence of Law Violation By the Erroneous Injection of the Private Law Doctrine of Secondary Meaning

When this case was here before, this Court held that the findings of confusion which the Board had made disclosed a Section 411 case, warranting a cease and desist order. 351 U.S. at 86. The Court remanded the case only for a determination as to whether those findings were supported by the evidence. *Ibid.* On the remand the lower court decided that the evidence did support those findings and accordingly upheld the Board's order prohibiting use of the North American name (R. 56).

But the lower court did not stop there. It went beyond the purpose of the remand and set aside the order insofar as it prohibited respondent's use of other names which contained the word American, such as Trans American, on the ground that the evidence did not support a finding of "secondary meaning" in the word American (R. 56-57). This was done, moreover, in face of the fact that the Board had expressly ruled that a finding of secondary meaning was not necessary in order to protect the public from name confusion. The Board had held:

> "We do not believe that in a case like the present, secondary meaning must be proven in order to protect the public against a clearly demonstrated and substantial public confusion. And

> this is certainly true where, as here, respondent has adopted a corporate name confusingly similar to the earlier adopted corporate name 'American Airlines.'" (R. 30).

The lower court's decision violated settled principles of this Court governing the discretion of administrative agencies in the framing of remedial orders to meet established law violations. An agency has "wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428 (1957). Thus, in reviewing an agency order, the court must recognize that an agency has "accumulated experience and knowledge which no court can hope to attain", *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 112 (1946); that the agency accordingly has "wide latitude for judgment", that the agency is expected to "draw from its generalized experience" in the area in question, and that "[i]ts expert opinion is entitled to great weight in the reviewing courts." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613, 614 (1946). The simple fact is that "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941).

It is equally well settled that, in the exercise of this broad discretion, an agency is not limited to an order directed solely at the specific form of the practice involved in the case before it.

> ". . . the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine

its roadblock to the narrow lane the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

See also *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52, 58, 59 (4th Cir. 1950); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F.2d 968, 971-972 (3rd Cir. 1941). Were the law different, the law violator would always be able to stay one jump ahead of effective enforcement, thereby rendering the agency powerless to protect the public.

While a remedial order must have a "reasonable relation to the unlawful practices found to exist," *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957), the Board's order fully meets this test. The lower court itself held the evidence sufficient to support the Board's finding that respondent's use of the name North American Airlines had caused substantial public confusion in violation of Section 411 (R. 56). The confusion was between the name American Airlines used by petitioner since 1934 and North American Airlines only recently adopted by respondent (R. 24-25, 27-28). The cause of that confusion was, of course, the presence of the word American in respondent's name. Accordingly, the Board determined to eliminate "what we find to be the source of such confusion"—*i.e.*, respondent's use of the word American (R. 31-32, 51-52). It cannot be said that a remedial order striking thus at the

source of law violation has no reasonable relation to the unlawful practice.

That the Board's order constituted a proper exercise of discretion is further evidenced by the fact that it embodies the same remedy applied by the Federal Trade Commission in disposing of name problems under the analogous Section 5 of the Trade Commission Act. Thus, in *Federal Trade Commission* v. *Real Products Corp.*, 90 F.2d 617 (2d Cir. 1937), the Commission order affirmed was one prohibiting the use of the word Champion "alone or in connection or conjunction with any other word or words . . ." 21 F.T.C. 714, 721 (1935). And in *Juvenile Shoe Co.* v. *Federal Trade Commission*, 289 Fed. 57 (9th Cir. 1923), *cert. denied*, 263 U.S. 705 (1923), the Commission order sustained was one prohibiting the respondent from using the word Juvenile as part of its corporate name. 5 F.T.C. 105, 111 (1922).[1]

Indeed, in some name cases Trade Commission orders have gone even beyond the Board's order at issue in this proceeding. Here, the order reached only names containing the word American. But in *Galter* v. *Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951), the Commission order sustained was one which proscribed use of the names Elgin, Hamilton, Remington, or Underwood, "*or any simulation thereof*, either alone or in connection with other words . . ." 44 F.T.C. 80, 102-103 (1947) (emphasis added). And in *Gold Tone Studios*,

[1] Other cases which involved name confusion between two companies and in which the Commission has barred use of a word or words as part of a name include the following: Sewing Machine Sales Corp., 19 Fed. Reg. 5573 (1954); National Blind Industries, 18 Fed. Reg. 7189 (1953); Illinois Sewing Machine Distributors, 18 Fed. Reg. 4592 (1953).

Inc., v. *Federal Trade Commission*, 183 F.2d 257 (2d Cir. 1950), the Commission order sustained was one prohibiting use of the words Gold Tone "*or any other word or words of similar import or meaning*, either alone or in combination with any other word or words, as a corporate or trade name. . ." 45 F.T.C. 206, 217-218 (1948) (emphasis added).

In thus following the established course of remedial treatment of comparable problems by the Federal Trade Commission, the Board clearly made "an allowable judgment in its choice of the remedy." *Jacob Siegel* v. *Federal Trade Commission*, 327 U.S. 608, 612 (1946). Moreover, the judgment of the Civil Aeronautics Board is entitled to even greater weight than is that of the Trade Commission in a case under Section 5 of the Trade Commission Act. For, as this Court noted in its previous decision in this case, whereas Section 5 "is concerned with purely private business enterprises which cover the full spectrum of economic activity," the Civil Aeronautics Act has committed the regulation of the air industry, peculiarly affected with a public interest, "to an administrative agency of special competence that deals only with the problems of the industry." 351 U.S. at 83-84.

Here, then, was an agency order which was directed at the root of the law violation and whose scope was no greater than, and, in some instances, less than, the scope of orders issued by the Federal Trade Commission over a period of some thirty years in similar cases of name confusion. Under these circumstances it was clear error for the court below to interfere with the Board's discretion. Affirmance of the decision below would undermine the fundamental principle laid

down in the *Ruberoid*, *Jacob Siegel* and *National Lead* cases that an agency is "not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Moreover, in setting aside the Board's order, the lower court injected into a statutory proceeding for the public's protection extraneous considerations applicable only to controversies between private parties over private property rights. It did so by holding that the existence of a private property right, or secondary meaning, in petitioner's name was a prerequisite to a ban on respondent's use of variations of the American name other than North American. And it did this in spite of the fact that the Board itself had held specifically, as we have pointed out, *supra*, pp. 20-21, that its decision was not based upon a finding of secondary meaning.

Actually, in rejecting secondary meaning as a requirement for a Section 411 case, the Board was merely following court decisions in name cases arising before the Federal Trade Commission. In *Juvenile Shoe Co.* v. *Federal Trade Commission*, 289 Fed. 57 (9th Cir. 1923), *cert. denied*, 263 U.S. 705 (1923), one of the arguments made against the order was that the word Juvenile could not be preempted by a competitor of the respondent before the Commission. The Court of Appeals for the Ninth Circuit explicitly recognized the argument, pointing out that, "It is not asserted that the Juvenile Shoe Corporation [the competitor] has the exclusive right to the word 'Juvenile' as applied to shoes . . ." and that, "it may be that the word 'Juvenile' is not susceptible of ap-

propriation as a trade mark." 289 Fed. at 59. Nonetheless the Court sustained the broad order of the Commission prohibiting use of the word Juvenile.

Again in *Galter* v. *Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951), a similar question was squarely presented. One of the arguments made against the Commission's order prohibiting all use of the words Elgin, Remington, and Underwood, was that these words were not the exclusive property of some competitor of the respondent. But the Court of Appeals for the Seventh Circuit held that the case was not an action for trade mark violation but a proceeding to protect the public, and concluded:

> "Thus the Commission's order would have substantial support in the evidence even though the statements that the names in question belonged exclusively to Elgin, Remington and Underwood were wholly disregarded." 186 F.2d at 814.

Similarly, in *Pep Boys—Manny, Moe and Jack, Inc.* v. *Federal Trade Commission*, 122 F.2d 158 (3rd Cir. 1941), the Court of Appeals sustained a Commission order proscribing the use of certain words in a trade name, even though it was clear that a number of different companies had long been using variations of those same words.

The simple fact is that, like the Section 5 Trade Commission cases, this is not a private law suit and was not tried on the basis of private law theory. In private suits a showing of secondary meaning is necessary to prove a property interest, without which there could be no recovery or equitable relief. But the purpose of a Section 411 proceeding is to protect common carrier air passengers against the evils of

name confusion in the already sufficiently complex process of selecting, catching or meeting the right airplane at the right time in busy airports. Under Section 411, as this Court in its prior decision made clear, the Board is concerned "not with punishment of wrongdoing or protection of injured competitors, but rather with protection of the public interest". 351 U.S. at 85. Hence, the existence or nonexistence of a private property right, or secondary meaning, in a carrier's name has no significance here.[1]

In its prior decision in this case this Court reversed the same lower court and held that the private law doctrines of deliberate deception or fraud and of injury to competitors could not determine Section 411 cases. 351 U.S. at 86. It should similarly dispose of the lower court's latest attempt to read into Section 411, and by inference into Section 5 of the Trade Commission Act, another and equally inapplicable private law doctrine—that of secondary meaning.

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[1] In its opposition to the grant of certiorari, respondent cited Jacob Siegel v. Federal Trade Commission, 327 U.S. 608 (1946), for the proposition that an "established trade mark or trade name" should not be excised if a less drastic remedy should suffice (Br. in Opp., pp. 9-10). But this case involves no established trademark or trade name of respondent. At issue now is respondent's right to use Trans American and other American names—not the North American name in which it had "established" good will. Moreover, the lower court was not applying the principle of *Siegel*. Rather, the lower court held that the Board was *precluded* from entering its remedial order absent a showing of private law secondary meaning.

CONCLUSION

The decision of the lower court, insofar as it set aside the Board's order, should be reversed.

Respectfully submitted,

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